PREME COURT, U. S.

MAY 22 1969

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 142

IN THE MATTER OF THE APPLICATION
OF
ABE FURMAN,
Petitioner-Appellant,
against

THE CITY OF NEW YORK, by Peter Campbell Brown, Corporation Counsel and ANDREW M. PINCKNEY, HARRY BORDEN and JAMES R. GEREGHTY, as Commissioners of Appraisal of Neversink Consolidated Riparian Sections Nos. 1 and 2,
Respondents-Appellees.

FOR AN ORDER PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE ACT.

JURISDICTIONAL STATEMENT.

LOUIS B. SCHEINMAN,
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THE REPORTER COMPANY, INC., Walton, N. Y. 13856—607 865-4131—1969

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Supreme Court of the United States

Term, 1969 No.

IN THE MATTER

of

The Application of ABE FURMAN,

Petitioner-Appellant,

against

THE CITY OF NEW YORK, by Peter Campbell Brown, Corporation Counsel and ANDREW M. PINCKNEY, HARRY BORDEN and JAMES R. GEREGHTY, as Commissioners of Appraisal of Neversink Consolidated Riparian Sections Nos. 1 and 2,

Respondents-Appellees,

For an Order Pursuant to Article 78 of the Civil Practice Act.

JURISDICTIONAL STATEMENT.

(a) Opinions Below.

The opinion of the Court of original jurisdiction, Supreme Court, Special Term, dated July 22, 1958, is unreported. A copy of said opinion is hereto annexed as Exhibit "A." The opinion of the Appellate Division of the Supreme Court, Third Department, conditionally dismissing the appeal herein, dated September 25, 1961, is unreported. A copy of said opinion is hereto annexed as

Exhibit "B." The opinion of the Appellate Division, Supreme Court, Third Department, denying appellant's motion to reinstate appeal dated October 22, 1968, has not been reported. A copy of said opinion is annexed hereto as Exhibit "C." The opinion of the Court of Appeals, dismissing appellant's appeal from the denial of the motion by the Appellate Division, dated February 26, 1969, has not yet been reported. A copy of said opinion is hereto annexed as Exhibit "D."

In a collateral case, the opinion of the Court of original jurisdiction, Supreme Court, Special Term, Sullivan County, December 17, 1965, was undated and unreported. A copy of said opinion is hereto annexed as Exhibit "E." The opinion of the original Court on a motion for re-argument and renewal made at Supreme Court, Special Term, Sullivan County, January 12, 1959, was made on or about September 1, 1963, and was not reported. A copy of said opinion is hereto annexed and made Exhibit "F." The Appellate Division of the Supreme Court, Third Department, reversed Special Term in an opinion dated December 18, 1964. Said opinion is reported at 22 A. D. 2d 984, 254 N. Y. 2d 748. A copy of said opinion is hereto annexed as Exhibit "G." The opinion of the Court of Appeals affirming the Appellate Division was dated November 29, 1967, and reported in 20 N. Y. 2d 568, 232 N. E. 2d 642, 285 N. Y. S. 2d 610. A copy of said opinion is hereto annexed as Exhibit "H." The decision of the Court of Appeals denying re-argument, dated February 21, 1968, has not yet been reported. A copy of said order of the Court of Appeals is hereto annexed as Exhibit "I." The order of the Court of Appeals amending its remittitur was dated April 18, 1968, and has not yet been reported. A copy of this order is hereto annexed as Exhibit "J."

(b) Grounds of Jurisdiction.

(i) Appellant is the owner of property riparian to the Neversink River in Sullivan County, New York. Appellee, City of New York, had acquired the right pursuant to an order of the New York Supreme Court to divert the said river upstream from appellant's property, pursuant to title K41 of the Administrative Code of the City of New York. Appellant had never been given notice by the appellee of the taking of his property, the notice provisions of said statute having called for publication and posting only. Appellant having therefore failed to file a claim within three-year limitation of time provided in said statute, appellee, City of New York, sought to bar his claim and to possess his property without compensation.

In the instant captioned action, appellant brought an Article 78 proceeding under the Civil Practice Law and Rules of the State of New York to compel the City of New York and the Commissioners of Appraisal appointed pursuant to the aforementioned title K41 of the Administrative Code of the City of New York, to hear his claim and award him damages therefor. Prior to the commencement of the instant proceeding appellant had, by regular motion, moved for an order to compel the hearing his case (see Exhibit E). In its decision on that matter, Special Term held that the action was improper and that in any event petitioner's only relief was by means of an Article 78 proceeding.

Consequently, the instant Article 78 proceeding was commenced. Special Term, ruling in the Article 78 proceeding, held that the matter had been determined in the regular motion (see Exhibit A).

Appellant filed a notice of appeal from the determination in the instant case and simultaneously made a motion for re-argument in the collateral case. The motion

for re-argument was there granted, and, accordingly, appellant allowed a conditional order dismissing the appeal to the Appellate Division in the instant case to be made and enforced.

Subsequently Special Term in the regular proceeding on the motion for re-argument and renewal granted the relief sought by appellant. On appeal to the Appellate Division in that case the Court reversed Special Term, upon the ground that the decision of this Court in *Schroeder v. City of New York*, 371 U. S. 208, 83 S. Ct. 279 (1962), did not determine this matter. On appeal to the Court of Appeals by appellant, said Court determined that the original order of Special Term was invalid because it was (allegedly) filed after the proper time and on the basis of the intervening *Schroeder* opinion. The Court of Appeals denied re-argument sought by appellant on the grounds that the application for renewal had been made prior to this Court's decision in *Schroeder* and that that decision had come down while the renewal motion was pending. It amended its remittitur to state that it made its decision, aware of the question raised by *Wisconsin Electric Power Co. v. Milwaukee*, 352 U. S. 948.

Having been caught in what he felt was a procedural trap, appellant made application to the Appellate Division to reinstate the appeal in the instant Article 78 proceeding. The Appellate Division denied this motion, and the Court of Appeals, on appeal, granted a motion by appellees and dismissed the appeal. The New York statutes in question were title K41-8.0 and K41-18.0, copies of which are annexed hereto as Exhibit "J."

(ii) The final order sought to be reviewed was made and entered by the Court of Appeals of the State of New York on the 26th day of February, 1969. The notice of appeal was filed May 13, 1969, with the Clerk of the

State of New York, Supreme Court, in and for the County of Sullivan.

(iii) The jurisdiction of this Court is invoked under 28 U. S. Code, §1257(2).

(iv) Cases believed to sustain the jurisdiction are: *Schroeder v. City of New York*, 371 U. S. 208; *Walker v. City of Hutchinson, Kansas*, 352 U. S. 112; *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306; *City of New York v. New York, New Haven and Hartford Railway Co.*, 344 U. S. 293; *Wisconsin Electric Power Co. v. Milwaukee*, 352 U. S. 948; *Wuchter v. Pizzuti*, 276 U. S. 13; *N.A.A.C.P. v. Alabama*, 357 U. S. 449; *Dice v. Akron, C. & Y. R. Co.*, 342 U. S. 359; *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U. S. 673.

(v) The validity of Section 8.0 and Section 18.0 of title K41 of the Administrative Code of the City of New York, prior to their amendment and change in 1964 to title K51-8.0 and K51-18.0 are in question. The statutes are set forth in the appendix hereto as Exhibit "J."

(c) Questions Presented.

(i) Whether Title K41-8.0 and K41-18.0 of the Administrative Code of the City of New York unconstitutional as applied in this case in the taking by the City of New York of appellant's real property without compensation and without adequate notice, and contrary to the principles laid down by this Court in the case of *Schroeder v. City of New York*, 371 U. S. 208?

(ii) Whether appellant was deprived of his property without due process of law by refusal of the Court of Appeals of New York to determine the constitutional question, by the refusal of the Court to apply the principles in the case of *Wisconsin Electric Power Co. v. Mil-*

waukee, 352 U. S. 948, and by refusing to determine the appeal to it on the merits?

(d) Statement of the Case.

Appellant is the owner of land on and riparian to the Neversink River downstream from the Neversink Dam.

Appellee, City of New York, brought a condemnation proceeding to acquire the right to divert said river, obtaining an order of condemnation in March of 1952. Oaths of commissioner were filed on June 2, 1952, causing said date to be the taking date. The statute of limitations for the presentation of claims, consequently, expired on June 2, 1955, three years thereafter.

This case deals with the same statutes, same river, and same condemnation proceeding as in the case of *Schroeder v. City of New York*, 371 U. S. 208. The appellee agrees that the notice, or lack of notice, given by it in this case was the same and identical to the notice in *Schroeder*, and constitutionally inadequate.

However, about 3 1/2 months prior to the expiration of the statute of limitations, appellant accidentally learned the taking. A formal claim was not filed during said period as a trial was scheduled for May of 1955. At the request of the corporation counsel the trial was adjourned to June, neither counsel realizing that no formal written claim had been filed. Thus, the June 2, 1955, date, which appellee claims to be the expiration date of the statute of limitations, intervened. On June 20, 1955, a hearing was held before the Commissioners of Appraisal, claimant being unable to proceed for the reason that he was an acute diabetic, ill and being transferred to the hospital. At said time, corporation counsel advised that no claim had been filed, but that on the basis of the cor-

respondence no objections would be raised under the statute of limitations.

The trial was adjourned from time to time, no questions being raised concerning the statute of limitations, and finally came on for hearing on October 4, 1956. At this hearing, appellee, for the first time, raised the question of the time limitation. The trial was adjourned until an adjudication could be obtained.

Shortly thereafter, appellant made a motion at Special Term, December 17, 1956, seeking such an adjudication. On this motion the only question presented was whether or not the correspondence in dealings between the parties was adequate to constitute the exhibition and presentation of the claim.

Special Term held that no claim had been exhibited or presented within the statutory period, and that the claim was barred for further reason that an Article 78 proceeding was required, instead of the motion that was made. Appellant did not appeal said order for the reason that, as he was advised by the Court, he had followed the wrong procedure. Instead, following the instructions of the Court, he brought the instant Article 78 proceeding by order to show cause dated August 9, 1957. This was done, instead of appeal, for the obvious reason that even if appellant's intentions were correct on the merits, he could not obtain the relief if he had the wrong procedure.

In the instant Article 78 proceeding, the Justice presiding held that the earlier determination of the first Special Term was *res judicata*. Appellant was clearly at that point in a procedural trap. Appellant, thereupon by notice of motion dated December 22, 1958, moved for both re-argument and renewal of the original motion first made before the Special Term.

This was done with the expressed permission of Mr. Justice Deckelman, the Justice who had decided the question initially.

There had been an intervening decision in the Supreme Court in another case, in November of 1957, holding that an Article 78 proceeding was not required (see *Application of Huie, etc., McElligott*, 7 A. D. 2d 599, 185 N. Y. S. 2d 471).

On this second motion before the first Justice, the prior papers were used (re-argument) and in addition thereto, all papers in the Article 78 proceeding wherein the constitutional question, as well as other additional matter was raised (renewal or rehearing) were also submitted. Thus, the second motion before Mr. Justice Deckelman, pursuant to his permission to make the same, was one for not only re-argument but also for renewal, labeled as such and also recognized by him in his decision as such.

The said motion remained undecided for 4 1/2 years. On December 17, 1962, this Court handed down its decision in *Schroeder v. City of New York*, 371 U. S. 208. Thereafter, on the authority of said case, Justice Deckelman decided in favor of appellant and ordered the trial of appellant's claim.

On appeal to the Appellate Division of the Supreme Court, Third Department, said Court reversed, stating:

> "Subsequently upon an application which was treated as one for *re-argument and renewal* of the initial motion the relief originally sought was granted solely upon the predicate of *Schroeder v. City of New York* (371 U. S. 208), which held the notice provisions of the statute to be constitutionally deficient. In our view of the respondent's knowledge of the condemnation proceeding, of his right to assert a claim against the City for dam-

> ages and the time limitation provided by the statute for its presentation, clearly demonstrated by the record, distinguishes this case from *Schroeder* (22 A. D. 2d 984, 254 N. Y. S. 2d 748)." (Italics added.)

The Court of Appeals affirmed, but on the grounds that Special Term should not have granted a motion for re-argument made after expiration of the time to appeal, "on the sole ground that in the interim, and Appellate Court has overruled its own or another statement of existing law." The Court also distinguished *Wisconsin Electric Power Co. v. Milwaukee*, 262 Wis. 111, 56 N. W. 2d 784, 272 Wis. 575, 76 N. W. 2d 341, 352 U. S. 948 and 958 and 81 N. W. 2d 298, on the grounds that the Wisconsin Supreme Court had given plaintiff leave to plead over, both of which holdings were based upon the factual misapprehensions.

Thus, caught in this procedural trap, appellant moved in the Appellate Division, Third Department, of the Supreme Court for permission to reinstate the appeal in the Article 78 proceeding, which appeal had been abandoned after the Trial Court in the original action had granted re-argument. The Appellate Division denied such application, and, on appeal to the Court of Appeals appellees' motion to dismiss the appeal was granted by the Court on the ground that the order appealed from did not finally determine the proceeding.

The Federal questions sought to be reviewed here were raised at all levels in the Article 78 proceeding. That is, in the original order to show cause which brought on the proceeding and the papers in support thereof these questions were raised. They were raised and discussed at length in the motion papers in the Appellate Division to reinstate the appeal, and were raised and discussed at length in the papers on the motion to dismiss in the Court of Appeals. The relief sought by appellant, un-

der this substantial federal question, was denied in each court.

(e) The Federal Question Raised is Substantial.

Does notice of the taking of one's property acquired accidentally or fortuitously by the property owner, ill and without knowledge of the time limitation, 3-1/2 months prior to the expiration of the 3-year time limitation contained in the defective statute, cure both the constitutional inadequacy of the statute, and also the failure to make a "good faith effort" to give notice, with the result that his claim is "forever barred" upon the date fixed by said statute?

This question might well be submitted in a different form, i. e., as follows: Where the condemnation statute is constitutionally defective in failing to provide notice of the taking of one's property and provides a 3-year period after the taking within which to make claim, where the municipality fails to make a "good faith effort" to give notice, yet, despite the foregoing, the property owner by pure chance learns of the taking, should he still not be, at the very least, entitled constitutionally and in all fairness to the 3-year statutory period, commencing from this acquisition of knowledge, within which to make his claim?

In the dissenting opinion in the Court of Appeals of New York, in *Schroeder*, 10 N. Y. 2d 522, Mr. Judge Dye, with whom Mr. Judge Van Voorhis concurred, said, at page 530:

> "If constructive service were to be authorized, it could have been provided in some form which was not calculated to go unobserved by the persons to be affected."

Also, Mr. Justice Stewart, speaking for this unanimous Court in *Schroeder* (371 U. S. 208), in holding the notice inadequate, said, at page 214:

> "That was the information which the city was constitutionally obliged to make at least a good faith effort to give personally to the appellant * * *"

We deal in this case with the same statute, same river, same condemnation proceeding, and the same notice, or lack of it, as in *Schroeder*. In said case this Court was undoubtedly shocked by the efforts of appellee to actually hide the notices, and their success in this respect to the extent that half of the property owners affected failed to file claims in time.

The clear and obvious effect of an affirmance, or refusal to note jurisdiction, by this Court would be to give appellee credit for the 2 years 8-1/2 months during which it had been successful in hiding the notice it was constitutionally obliged to give.

A sound reason that the chance acquisition of knowledge by appellant did not retroactively cure the defect in the statute, and failure to give notice, is that title to the property in question could not constitutionally have vested in appellee until there had been adequate notice. Since the time period, under the statute, does not commence to run until title vests, the very earliest the statute could have commenced to run was the date upon which such notice was accidentally acquired.

After *Schroeder*, appellee sent out letters to property owners advising them of the taking, in accordance with this Court's decision. Property owners thus receiving notice in 1963 had a three-year period measured therefrom. Compare this with the New York Law enunciated in the instant case.

Another reason for the statute in the instant case to have commenced to run (if at all) when Mr. Furman by chance acquired knowledge of the taking is the fact, conceded here, that the City never *gave* notice. Inherent in all cases discussing the adequacy of notice is the accepted principle that the notice we speak of is that which the taking party must *give*. The duty is always that of *giving* notice.

For example, in *Schroeder*, *supra*, the Court spoke of the information which the City was obliged to make at least a good faith effort "to give personally" to the appellant.

In *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306 at page 314, the Court spoke of the requirement of notice reasonably calculated "under all the circumstances, to apprise interested parties" of the suit and to afford them the opportunity to be heard, citing a host of cases.

In *New York v. New York, N. H. & H. R. Co.*, 344 U. S. 293, the Court spoke of the creditors' knowledge or reorganization proceedings, but pointed out that the argument that such knowledge placed the duty on him to inquire about possible Court orders limiting the time for filing claims was unavailing, stating:

> "But even creditors who have knowledge of a reorganization, have a right to assume that the statutory 'reasonable notice' will be *given* them before their claims are forever barred" (italics added).

The notice required to satisfy due process is that notice *which is given*, and not that which may have been fortuitously *received*.

Here, the City did not "make at least a good faith effort to give" the minimum notice. It is respectfully submitted that this utter failure to give notice was not

cured retroactively, overcome and forgiven by Mr. Furman's chance and accidental acquisition of knowledge.

In order for this Court to hold that the notice in this case was constitutionally adequate for appellant, because of his knowledge, it would be necessary to sweep under the rug the case of *Wuchter v. Pizzuti*, 276 U. S. 13 (1928). It is just impossible to affirm the order of the Court below without deliberately disregarding *Wuchter*.

The point of decision in *Wuchter* was that extra-statutory notice could not supply constitutional validity to a defective statute.

A municipality should not be permitted to take property under a condemnation statute containing a time limitation within which the property owner must make his claim, and effectively shorten said time contrary to said statute by either giving the notice later, or waiting until the property owner acquires the notice himself in some manner.

With the vast amount of eminent domain proceedings taking place by federal, state and local governments, this question of notice as related to the limitation of time within which the property owners must make his claim in order to be paid is of wide importance, and therefore substantial.

In the case at bar, if appellant's claim is barred, he is paid nothing for the property taken from him.

Appellees will undoubtedly contend that there is no federal question here as the Court of Appeals decision was based on a purely procedural question, i. e., that it could not entertain the appeal as there was no final decision from the lower Court.

It is respectfully contended that nonetheless a review of the underlying clearly substantial federal issues involved can be had from such determination. Thus, in *Wisconsin Electric Power Co. v. Milwaukee*, 352 U. S. 948, the Supreme Court of Wisconsin had affirmed a lower Court's holding sustaining a demurrer to the complaint. Thereafter, as the record in said case shows, the plaintiff obtained leave of the Circuit Court to plead over which second complaint did not differ substantially from the first. The demurrer to the new complaint was again sustained, and, upon appeal, the Wisconsin Supreme Court unanimously affirmed on the basis of their rule as to finality of its prior holding. Yet, on appeal to this Court, this Court reversed and remanded.

Implicit in the holding of this Court in *Wisconsin Electric*, is that where property rights are taken without due process, and such constitutional question is properly raised, that a local procedural rule would not bar review by this Court if the procedural grounds were either on an unfair or unsubstantial basis (*Lawrence v. State Tax Commission*, 286 U. S. 276). This would include inadequate support in prior state procedural determinations (*Rogers v. Alabama*, 192 U. S. 226), the interests of justice (*Patterson v. Alabama*, 294 U. S. 600). Although in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, relief was denied by the State Court for failure to resort to an administrative remedy, and the constitutional point was raised for the first time on petition for a rehearing in the State Court, this Court nevertheless reviewed the underlying constitutional question (see also *Davis v. Wechsler*, 263 U. S. 22; *New York Central R. R. v. New York & Pennsylvania Co.*, 271 U. S. 124; *Dice v. Akron, C & Y R. Co.*, 342 U. S. 359).

In conclusion, it is respectfully pointed out that the shortening of a 3-year statute of limitations to 3-1/2 months, there having been no notice given but notice only fortuitously acquired at said time, is an abuse of due process repugnant to one's sense of justice and fair play. To permit the same to stand as the law of the State of New York, which it is at the present time in view of the Appellate Division decision in this case, raises a serious and substantial federal question.

It is also respectfully submitted, in conclusion, that appellant should not be deprived of his property without compensation, and the opportunity for review by this Court, because he followed the instructions of Mr. Justice Deckelman on the first motion before him and brought an Article 78 proceeding instead of disregarding his instructions and appealing. This conduct by appellant and his counsel should not be the basis of ensnarement in a procedural trap, barring review of the case on its merits, and, in reality, depriving him of his day in court.

Respectfully submitted,

LOUIS B. SCHEINMAN,
Counsel for Appellant.

APPENDIX.

Exhibit A.

NEW YORK SUPREME COURT,

SULLIVAN COUNTY,

Third Judicial District.

IN THE MATTER

of

The Application of ABE FURMAN,

Petitioner,

against

THE CITY OF NEW YORK, by Peter Campbell Brown, Corporation Counsel, and ANDRES M. PINCKNEY, HARRY BORDEN and JAMES R. GEREHTY, as Commissioners of Appraisal of Neversink Consolidated Riparian Sections 1 and 2,

Respondents,

For an order pursuant to Article 78 of the Civil Practice Act.

Memorandum.

(SCHIRICK, J.)

This application is brought pursuant to Article 78 of the Civil Practice Act for an order requiring the commissioners of appraisal to hear and determine petitioner's claim.

The matter came on to be heard by commissioners on October 4, 1956. During the course of the hearing it was discovered that no verified claim in writing had ever been presented. The trial was thereupon halted with the understanding that an application would be made by the petitioner at Special Term for a determination as to the commissioners' right to continue the hearing and to make an award.

The petitioner thereupon moved at a Special Term held in Sullivan County on December 17, 1956 for an order compelling the City of New York and the commissioners of appraisal to set a date for the trial of his claim and to determine the compensation to be paid for the diversion of the waters of the Neversink River. Such motion was denied by Mr. Justice Deckelman in an opinion reading as follows:

> "The claimant moves for an order pursuant to the Administrative Code of the City of New York. Title K-41, to compel the City of New York, by its Law Department, and the commissioners of appraisal of Consolidated Neversink Riparian Sections Nos. 1 and 2, to set a date for the trial of the above entitled claim, to hear same and to determine the just and adequate compensation to which claimant is entitled. The contention of the City is that no claim was ever exhibited and presented to the Commissioners of appraisal within three years after title became vested in the city (K41-18.0[a]) and therefore the claimant is now barred under Section K41-18-0. The Court agrees with this contention and the motion is denied on the authority of the opinions rendered by Mr. Justice McAffer on the Murray Bruckman, (Parcel 149, Sec. 3) and Meyer and Rose Levine (Parcel 140, Sec. 2) motions, copies of which were sub-

mitted to the Court and counsel for the claimant, and for the further reason that the kind of relief herein sought must be applied for under Article 78 of the Civil Practice Act.

"Submit order."

No appeal was taken from Mr. Justice Deckelman's order and it stands as the law of the case. The relief sought then was the same as now. The facts and issues were identical. That the prior application was by motion whereas the present is by proceeding pursuant to Article 78 does not alter the situation. Issues once decided may not be again presented for determination to the same court or to a court of coordinate jurisdiction.

The petitioner seeks to avoid the effect of the prior decision by urging that it rests upon procedural grounds. The opinion indicates the contrary. While the final words add "the further reason that the kind of relief herein sought must be applied for under Article 78 of the Civil Practice Act," equal weight must, to say the least, be given to the words preceding wherein the court agrees with the city's contention that the claim is barred under Section K41-18.0 and with the decisions previously rendered by Mr. Justice MacAffer to like effect.

The application is denied.

Decided: July 22, 1958.

Exhibit B.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

September 25, 1961

IN THE MATTER

of

The Application of ABE FURMAN,

Appellant,

versus

THE CITY OF NEW YORK and ANDRES M. PINCKNEY, *et al.,*

Respondents.

Appeal dismissed without costs unless appellant shall file and serve record, brief and note of issue on or before December 1, 1961 and to be ready for argument at the January, 1962 Term of this Court, in which event the motion is denied.

Exhibit C.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

October 22, 1968

IN THE MATTER

of

The Application of ABE FURMAN,

Appellant,

against

THE CITY OF NEW YORK and ANDRES M. PINCKNEY, *et al.*,

Respondents.

The motion to reinstate the appeal is denied, without costs.

Exhibit D.

COURT OF APPEALS,

STATE OF NEW YORK.

February 26, 1969

IN THE MATTER

of

The Application of ABE FURMAN,

Appellant,

against

THE CITY OF NEW YORK and ANDRES M. PINCKNEY, *et al.*,

Respondents.

Opinion.

Motion to dismiss the appeal granted and the appeal dismissed, without costs, upon the grounds that the order appealed from does not finally determine the proceeding within the meaning of the constitution (*Eagle v. Cherney*, 290 N. Y. 741).

Exhibit E.

IN THE MATTER

of

The Application and Petition of IRVING V. A. HUIE, RUFUS E. MCGAHEN and EDWARD C. MCGUIRE, constituting the Board of Water Supply of the City of New York,

Appellee,

To acquire real estate for and on behalf of the City of New York under Title K of the Administrative Code of the City of New York (L. 1937, Ch. 929), in the County of Sullivan, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

NEVERSINK RIPARIAN SECTION NO. 1

ABE FIRMAN (Parcel No. 34),

Appellant.

Memorandum.

DECKELMAN, J.:

The Claimant moves for an order pursuant to the Administrative Code of the City of New York, Title K-41, to compel the City of New York, by its Law Department, and the Commissioners of appraisal of Consolidated Neversink Riparian Sections Nos. 1 and 2, to set a date for the trial of the above entitled claim, to hear same and to determine the just and adequate compensation to which claimant is entitled. The con-

tention of the City is that no claim was ever exhibited and presented to the Commissioners of appraisal within three years after title became vested in the City (K41-18.0 (a) and therefore the claimant is now barred under Section K41-18-0. The Court agrees with this contention and the motion is denied on the authority of the opinions rendered by Mr. Justice MacAffer on the Murray Bruckman (Parcel 149 Sec. 3) and Meyer and Rose Levine (Parcel 140 Sec. 2) motions, copies of which were submitted to the Court and counsel for the claimant, and for the further reason that the kind of relief herein sought must be applied for under Article 78 of the Civil Practice Act.

Submit order.

Exhibit F.

In the Matter

of

The Application and Petition of Irving V. A. Huie, Rufus E. McGahen and Edward C. McGuire, constituting the Board of Water Supply of the City of New York,

Appellee,

To acquire real estate for and on behalf of the City of New York under Title K of the Administrative Code of the City of New York (L. 1937, Ch. 929), in the County of Sullivan, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

Neversink Riparian Section No. 1

Abe Furman (Parcel No. 34),

Appellant.

Memorandum.

Deckelman, J.:

This is a motion by Claimant for an order directing Commissioners of Appraisal, Neversink Riparian Section No. 1 to hear and determine the above entitled claim.

Claimant's attorneys contend that this is a re-argument and renewal of a previous motion made before me, returnable on December 17, 1956, at Special Term, Sullivan County, which motion was denied, his contention being that additional facts relevant to the motion were not brought to the attention of the Court.

It appears that the reason no hearings were had before the Commission then constituted was that no written claim was ever filed although the claim had been scheduled for hearing before the Commission.

It appears further that a further motion was made by Claimant returnable at Special Term before Mr. Justice Schirick which was denied upon the ground that the motion was already determined by my order on the motion returnable on December 17, 1956.

Since all of these proceedings the Supreme Court of the United States in the case of *Madeline C. Schroeder against the City of New York* was held that notice of the Condemnation Proceedings was defective.

The motion is granted upon the authority of the decision of the Supreme Court of the United States in *Schroeder v. The City of New York*. Submit order.

Exhibit G.

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

December 18, 1964. 6856

IN THE MATTER

of

IRVING V. A. HUIE, *et al.*, as Board of Water Supply of the City of New York,

Appellant,

v.

ABE FURMAN,

Respondent.

Per Curiam.

The City of New York appeals from an order of the Supreme Court at Special Term which directed Commissioners of Appraisal having jurisdiction in the premises to hear and determine a claim for damages arising from the acquisition in a proceeding instituted under its Water Supply Act (Administrative Code of City of New York, Title K) of an easement in perpetuity to divert a portion of the Neversink River from premises owned by respondent.

Concededly no claim for damages to his property was exhibited and presented to the Commissioners of Appraisal with the three-year period prescribed by the act (§ K41-18.0, now § K61-18.0). In a prior memorandum decision Special Term determined that these omissions barred the claim. From the order entered thereon claimant took no appeal.

Subsequently upon an application which was treated as one for reargument and renewal of the initial motion the relief originally sought was granted solely upon the predicate of *Schroeder v. City of New York* (371 U. S. 208) which held the notice provisions of the statute to be constitutionally deficient. In our view respondent's knowledge of the condemnation proceeding, of his right to assert a claim against the City for damages and of the time limitation provided by the statute for its presentation, clearly demonstrated by the record, distinguishes this case from *Schroeder*.

Order reversed, on the law and the facts, without costs; and motion denied, without costs.

Gibson, P. J., Herlihy, Reynolds, Taylor and Hamm, JJ., concur.

Exhibit H.

COURT OF APPEALS,

STATE OF NEW YORK.

3. No. 246 66

IN THE MATTER

— of

The Application and Petition of IRVING V. A. HUIE, & ors., constituting the Board of Water Supply of the City of New York,

Respondents.

To acquire real estate &c.

NEVERSINK RIPARIAN SECTION No. 1.

AMY FURMAN (Parcel No. 334),

Appellant.

Opinion.

BURKE, J.:

Claimant appeals from an order of the Appellate Division, Third Department, unanimously reversing an order of the Supreme Court, Sullivan County, granting claimant's motion requesting that the Commissioners of Appraisal be directed to hear and determine claimant's claim for damages to his property allegedly caused by the Neversink dam.

Although not described as such, the instant motion was, and this is clear from the moving papers submitted

in support of it, one for reargument of a motion earlier made and decided by Justice Deckelman at Special Term, from which no appeal was taken and which it was now sought to have vacated. The motion for reargument was made long after claimant's time to appeal from the original order had expired. It was granted on the basis of Justice Deckelman's belief that *Schroeder v. City of New York* (371 U. S. 208), decided subsequent to his earlier decision, called for a different decision than that which he had earlier made.

The question of *Schroeder's* applicability to the facts of this case is difficult indeed, but before this issue can even be reached there are preliminary problems which must be resolved, namely, determination of whether the order in this case is a final order appealable to this Court and determination of whether the grant of reargument after claimant's time to appeal had elapsed was proper as a matter of law.

In a situation such as this, where the *effect* of an Appellate Division reversal of Special Term's grant of reargument and the entry of a new final order is to place the parties back precisely where they were under the original final determination, "two competing principles operate." (Cohen & Karger, Powers of the New York Court of Appeals, p. 451.) There is the principle of finality and there is the "countervailing * * * consideration that the decision by the Special Term constitutes a new and original final determination." (*Ibid.*) In the past this Court has, however, consistently found such orders to be final for purposes of our jurisdiction. (See Cohen & Karger, pp. 450-53, and cases cited therein; see, also, *Humbeutel v. Humbeutel*, 305 N. Y. 159, 161, citing *S. J. E. Building Corp. v. Matt O. M. Constr. Co.*, 265 N. Y. 282, and *Hansen v. City of New York*, 299 N. Y. 136.)

More certainly fatal to appellant's cause was the error of Special Term in granting his motion to set aside the prior order on the basis of *Schroeder*, decided by the United States Supreme Court in 1962, five years after the original order was served upon appellant. This earlier determination was a final order settling the rights of the parties under existing law (as the court viewed it). It held that appellant's claim was barred by the statute of limitations and, additionally, that the relief requested was available only in an Article 78 proceeding. (R.A. 56-57.) No appeal was taken from this order. Instead, appellant brought an Article 78 proceeding, and here also failed, with Special Term there properly deciding that the statute of limitations issues had been conclusively determined by Justice Beckelman.)

Appellant's attorney throughout his papers claims that he was forced into a "procedural trap" by Special Term's statement in its opinion that the relief requested was available only in an Article 78 proceeding, but this is simply not so. Special Term clearly indicated that its decision was based upon the fact that the claim was not timely, as well as upon the fact that an Article 78 proceeding would be necessary. With no appeal having been taken from this determination, the City was entitled to rely upon it as a final determination of the matter.

Special Term's later vacation of its prior determination on the basis of *Schroeder* was in our view improper as a matter of law. In *Dewey v. Eclaire Fire Mass. Co.* (14 N. Y. 2d 633) we consider this precise issue. There the question squarely presented was whether an original decision determining the rights and positions of the parties should be reversed on a motion for reargument made after the expiration of the time to appeal on the sole ground that in the interim, an appellate court has overruled its own or another statement of existing law. The Appellate Division had decided that a motion for

reargument could not be granted on such grounds after the time to appeal had expired (see 19 A. D. 2d 735) and to their certified question "Was the order of this Court * * * properly made," we answered in the affirmative. (14 N. Y. 2d 633, 635.) While this result might at times seem harsh, there must be an end to law suits and the time to take an appeal cannot forever be extended. Absent the sort of circumstances mentioned in CPLR Rule 5015, such as newly discovered evidence, fraud, lack of jurisdiction, etc., a determination of a court from which no appeal has been taken ought to remain inviolate. (*Cf. Sears, Roebuck & Co. v. 9 Avenue-31 Street Corp.*, 274 N. Y. 388, 401-402, remittitur amended, 274 N. Y. 636; *People ex rel. Banker's Trust Co. v. Graves*, 270 N. Y. 316; *Joannes Bros. v. Lamborn*, 237 N. Y. 207.)

In answer to the argument of the City that the grant of reargument on the basis of *Schroider* was improper, appellant draws our attention to a series of decisions in which the Wisconsin Supreme Court was forced, by reason of a reversal by the United States Supreme Court, to hold that a plaintiff could successfully attack assessments by a public authority on the basis of failure to provide proper notice, where the Wisconsin court had once held, on the merits, that notice was proper, and later had held that, despite an intervening United States Supreme Court decision to the contrary, its earlier determination constituted the "law of the case." (See *Wisconsin Electric Power Co. v. Milwaukee*, 263 Wisc. 111, 56 N. W. 2d 784, 272 Wisc. 575, 76 N. W. 2d 341; 352 U. S. 948 and 958 and 81 N. W. 2d 298.) As the statement of the case the second time it was before the Wisconsin Supreme Court reveals, however, upon the original remand the plaintiff had obtained leave of court to plead over and the case was then before the court on the basis of the city's demurrer to plaintiff's

amended complaint in the same proceeding. (See 76 N. W. 2d at 342.) It might well have been that the United States Supreme Court would not have taken this case after plaintiff had first lost in the Wisconsin Supreme Court, on the ground that plaintiff had not exhausted his state remedies, and, in any event, with the Wisconsin Supreme Court having given plaintiff leave to plead over, its earlier determination holding notice sufficient did not have the same effect of finally determining the ultimate rights of the parties that the original order of Justice Deckelman in the instant case did. In truth, the matter was still pending.

We are of the opinion that the grant of reargument in the instant case was improper as a matter of law. On this basis we believe the order of the Appellate Division should be affirmed.

Order affirmed without costs. Opinion by Burke, J. All concur.

Exhibit I.

IN THE COURT OF APPEALS.

STATE OF NEW YORK.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-first day of February A. D. 1968.

Present,

Hon. Stanley H. Fuld, Chief Judge presiding.

Mo. No. 193

IN THE MATTER

of

The Application and Petition of IRVING V. A. HEIM, & ors., constituting the Board of Water Supply of the City of New York,

Respondents,

To acquire real estate &c.

NEVERSINK RIPARIAN SECTION No. 1.

ABE FURMAN (Parcel No. 34),

Appellant.

A motion for reargument of the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy

(Seal.)

GEARON KIMBALL,
Deputy Clerk A

Exhibit J.

IN COURT OF APPEALS.

STATE OF NEW YORK.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighteenth day of April A. D. 1968.

Present,

Hon. Stanley H. Fuld, Chief Judge presiding.

Mo. No. 346

IN THE MATTER

of

The Application and Petition of IRVING V. A. HUIE, & ors., &c.

Respondents.

To acquire real estate &c. for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

NEVERSINK RIPARIAN SECTION NO. 1, ABE FURMAN, (Parcel No. 34),

Appellant.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether under *Wisconsin Electric Power Co. v. Milwaukee* (352 U. S. 948) we were bound, despite our own procedural rule that reargument on the basis of a subsequent appellate court decision may not be granted by our lower courts after the time to appeal from their decisions has elapsed, to consider claimant's contention that the form of notice provided herein was insufficient under *Schroeder v. City of New York* (371 U. S. 208). The Court of Appeals, in passing upon this contention, held that *Wisconsin Electric Power Co. v. Milwaukee* (*supra*) did not require that our rule as to what may be considered on such a motion for reargument be modified and therefore did not reach the question of the applicability of *Schroeder v. City of New York* (*supra*).

AND the Supreme Court of Sullivan County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

GEARON KIMBALL
Deputy Clerk

Exhibit K.

Title K-01, Administrative Code of the City of New York

Statutes.

K-01 s-0 Notice of application for appointment of commissioners of appraisal. The corporation counsel shall give notice in the city record, and in two public newspapers published in the city of New York, and in two public newspapers published in each other county in which any real estate laid out on such maps is located, and which it is proposed to acquire in the proposed use, of his intention to make application to such court for the appointment of commissioners of appraisal which notice shall specify the time and place of such application, which shall not be sooner than ten days after the first publication of such notice, and shall describe the real estate sought to be taken or affected by reference to the maps thereof. A statement of the real estate to be acquired or affected for the purpose of carrying out the said plan or plans of the proposed rapid transit railroad, with sufficient enumeration of the numbers of the streets to be taken in fee and of the numbers of the parcels in which an easement is to be acquired, together with the route of the tunnels and appendages by courses and distances and of the greatest and least width of its required easement as proved as land is taken, by reference to the dates and places of filing such maps, shall be sufficient description of the real estate sought to be so taken or affected. Such notice shall be published once in each week in such newspapers for six weeks immediately previous to the presentation of such petition; and the corporation counsel shall in addition to such advertisement cause copies of the same in hand bills to be posted up for the same space of time in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate sought to be taken or affected. After the appointment of commissioners of appraisal pursuant to the provisions of this article, the corporation counsel

(39433)

FILED

JUN 16 1963

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1963

No. [redacted] 1963

IN THE MATTER OF THE APPLICATION

of

ABE FURMAN,

Petitioner-Appellant,

—against—

THE CITY OF NEW YORK, by Peter Campbell Brown, Corporation Counsel and ANDREW M. PINCKNEY, HARRY BORDEN and JAMES R. GEREGHTY, as Commissioners of Appraisal of Neversink Consolidated Riparian Sections Nos. 1 and 2,

Respondents-Appellees.

For an Order Pursuant to Article 78 of the Civil Practice Act

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

J. LEE RANKIN,
Corporation Counsel of the City of New York,
Attorney for Appellees,
Municipal Building,
New York, N. Y. 10007

STANLEY BUCHSBAUM,
THEODORE R. LEE,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1423

IN THE MATTER OF THE APPLICATION

of

ABE FURMAN,

Petitioner-Appellant,

—against—

THE CITY OF NEW YORK, by Peter Campbell Brown, Corporation Counsel and ANDREW M. PINCKNEY, HARRY BORDEN and JAMES R. GEREGHTY, as Commissioners of Appraisal of Neversink Consolidated Riparian Sections Nos. 1 and 2,

Respondents-Appellees,

For an Order Pursuant to Article 78 of the Civil Practice Act

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

The appellees move pursuant to Rule 16 of the Rules of the Supreme Court of the United States to dismiss the appeal on the ground that the decision appealed from was based on a non-federal ground and did not involve a determination of the validity of the statute.

Counter-Statement of Question Presented

Was the decision sought to be reviewed based on an adequate, independent non-federal ground?

Statement of the Case

This proceeding was brought under the provisions of Article 78 of the Civil Practice Act of the State of New York for an order requiring commissioners of appraisal in a condemnation proceeding to hear and determine the appellant's claim for damages to his property allegedly resulting from the diversion of water from the Neversink River by appellee.

The application brought on pursuant to this proceeding was denied by the New York Supreme Court on the grounds that the appellant had previously unsuccessfully sought identical relief in the condemnation proceeding, and that the order in the condemnation proceeding constituted the law of the case (Davis, Statement, Exh. A, pp. 17-19).

Appellant appealed to the Appellate Division from the order entered on such application. By decision dated September 25, 1961, that court dismissed the appeal unless the appellant filed and served the record, brief and note of issue on or before December 1, 1961, and was ready for argument at the January 1962 Term of that court. The decision of the Appellate Division is officially reported in 13 A D 2d 712 (3d) and its text is set forth in the appendix of the Jurisdictional Statement, Exh. B, p. 20. The record, brief and note of issue were never served or filed, and the appeal was never argued.

Six years later appellant made a motion in the Appellate Division to reinstate the appeal which was denied

by an unreported decision of that court, dated October 22, 1968, the text of which is set forth in the appendix of the Jurisdictional Statement. Exh. C, p. 21.

Appellant then appealed to the New York Court of Appeals from the order entered on such motion, but, on motion of appellee, such appeal was dismissed upon the grounds that the order appealed from did not finally determine the proceeding within the meaning of the New York Constitution. The memorandum opinion of the New York Court of Appeals is officially reported at 23 N Y 2d 1041 and the text is set forth in the appendix of the Jurisdictional Statement, Exh. D, p. 22. The order entered on that opinion is the order which the appellant now seeks to review.

Facts

As indicated previously, this Article 78 proceeding arose out of an earlier condemnation proceeding commenced by the Board of Water Supply of the City of New York on behalf of the City of New York, the appellee herein, under Title K, Chapter 41 (now Chapter 51) of the Administrative Code of the City of New York (L. 1929, ch. 929), known as the Water Supply Act, to acquire the right to divert water from the Neversink River.

The oaths of office of the commissioners of appraisal in the New York condemnation proceeding were filed in the Sullivan County Clerk's office on May 29, 1952, and in the New York County Clerk's office on June 2, 1952. The City thereupon became vested with the right to divert water, as specified in the petition and the order appointing commissioners of appraisal pursuant to the Administrative Code of the City of New York (§K41-11.0). Actual diversion commenced June 1, 1953.

No claim on behalf of appellant for damages to his property allegedly resulting from the diversion was served or presented to commissioners within three years of the filing of the oaths of office of the commissioners as prescribed by the statute. The explanation of the attorney for the appellant for the failure to file a claim was that on February 23, 1955, he forwarded a proposed claim to appellant for his signature; that appellant misplaced the claim; and that the attorney overlooked the fact the claim had not been signed, returned and filed.

At a hearing before commissioners of appraisal, on October 4, 1956, more than four years and four months after the City acquired the right to divert and more than three years and four months after the actual diversion commenced, appellant sought to prove damages to his property.

Accordingly, the City, at the hearing of October 4, 1956, interposed the defense of the statute of limitations on the ground that no claim had been filed or presented within three years of the taking as required by the Administrative Code of the City of New York §K41-18.0 (now §K51-18.0). The commissioners of appraisal thereupon halted the trial to afford the parties an opportunity to obtain an adjudication as to the effect of the failure of appellant to file a timely claim (Juris. Statement, Exh. A, p. 18).

After the refusal of the commissioners of appraisal to hear the claim, appellant moved, in the condemnation proceeding, for an order directing the commissioners to hear the claim and to determine the compensation to be made on the ground that allegedly certain communications between appellant's attorney and the New York City Law Department were the equivalent of a claim and that appellee had, in effect, waived the filing of a claim.

Such motion was denied by the New York Supreme Court on the ground that the claim was barred by the statute of limitations and on the further ground that the kind of relief sought must be applied for under Article 78 of the New York Civil Practice Act (Juris. Statement, Exh. E, pp. 23-24). An order was entered on April 15, 1957, and served on the attorneys for appellant by mail on April 18, 1957. There was no appeal taken from such order.

After the time to appeal from that order of the New York Supreme Court had elapsed, the present Article 78 proceeding was commenced on behalf of appellant, by order to show cause and affidavit dated August 9, 1957, seeking the same relief as had been unsuccessfully sought on the previous motion in the condemnation proceeding. The issues were the same on the second application as on the first except that on the second application it was contended in addition that (1) the provisions of the Water Supply Act were unconstitutional and (2) that appellee failed to comply with the Water Supply Act in certain respects. Those questions could have been but were not raised on the previous motion in the condemnation proceeding.

The application in this Article 78 proceeding was denied by the New York Supreme Court in an unreported memorandum dated July 22, 1958, on the ground that no appeal had been taken from the previous order in the condemnation proceeding and that such order stood as the law of the case (Juris. Statement, Exh. A, pp. 17-19).

The order on such decision was entered on July 25, 1958. A notice of appeal from such order, dated July 30, 1958, was served on August 1, 1958. However, appellant did not prosecute that appeal in this Article 78 proceed-

ing. Consequently, a motion was made to dismiss that appeal. This resulted in an order of the Appellate Division, dated September 6, 1961, and entered on September 25, 1961, which granted the motion to dismiss unless appellant filed and served the record, his briefs, and the note of issue on or before December 1, 1961, and was ready for argument at the January 1962 term of the Appellate Division, in which event the motion was denied [14 A D 2d 712(3), Juris. Statement, Exh. B, p. 20]. The record, brief and note of issue were never served.

On December 22, 1958, appellant made a motion in the condemnation proceeding for reargument of the previous motion which he had made in that proceeding. Such motion was granted solely on the predicate of *Schroeder* v. *New York,* 371 U. S. 208 (1962). (Juris. Statement, Exh. F, pp. 25-26). However, the New York Appellate Division reversed on the ground that *Schroeder* was clearly distinguishable (22 A D 2d 984, 254 N. Y. S. 2d 748, Juris. Statement Exh. G, pp. 27-28). The New York Court of Appeals affirmed on the ground that the earlier determination in the condemnation proceeding was a final order which settled the rights of the parties (20 N Y 2d 568, 232 N. E. 2d 642, Juris. Statement, Exh. H, pp. 29-33). A motion for reargument was denied (21 N Y 2d 880, Juris. Statement, Exh. I, pp. 34-35) and subsequently a motion to amend the remittitur to show that a constitutional question was presented and passed upon was granted (21 N Y 2d 1036, 238 N. E. 2d 503, Juris. Statement, Exh. J, pp. 36-37).

A notice of appeal to this court was served and filed on behalf of appellant on July 12, 1968. This was more than seven months after the decision of the New York Court of Appeals on November 29, 1967, and more than

four months after entry of the order denying reargument of the appeal on March 4, 1968. It was within 90 days of the amendment of the remittitur. A jurisdictional statement was received by appellees on July 26, 1968. However, the appeal, in the condemnation proceeding, to this court was withdrawn on or about July 30, 1968.

Thereafter appellant moved before the New York Appellate Division, in this Article 78 proceeding, for that court to reinstate the appeal which it had previously dismissed in 1961. Such motion was denied (Juris. Statement, Exh. C, p. 21). Appellant then appealed from the order entered on that denial to the New York Court of Appeals, but that court dismissed the appeal on the ground that the order appealed from did not finally determine the proceeding within the meaning of the New York Constitution (23 N Y 2d 1011, Juris. Statement, Exh. D, p. 22). The order entered on such motion is the one appellant now seeks to have this Court review.

ARGUMENT

The order of the New York Court of Appeals appealed from is not reviewable because it was based on an adequate, independent non-federal ground.

As appears from the memorandum opinion of the New York Court of Appeals (23 N Y 2d 1011, Juris. Statement, Exh. D, p. 22), the decision sought to be reviewed here was based on the New York procedural rule that the New York Court of Appeals will not review an order which does not finally determine the proceeding within the meaning of the New York Constitution. It is therefore clear that the decision was put upon an adequate, independent non-federal ground which was broad enough to sustain the order.

This Court will not review a judgment of a state court which is put upon a non-federal ground, independent of the federal question involved and broad enough to sustain the judgment. See *McCoy* v. *Shaw,* 277 U. S. 302 (1928); *Nickel* v. *Cole,* 256 U. S. 22 (1920); *Fox Film Corp.* v. *Mueller,* 296 U. S. 207 (1935); STERN & GRESSMAN, *Supreme Court Practice* (3d Ed. 1962), pp. 105-106, 110-112; 36 C.J.S., *Federal Courts,* §244, pp. 715-719.

In the case at bar the non-federal ground upon which the New York Court of Appeals rested its decision was based on its earlier decision in *Eagle* v. *Cherney,* 290 N. Y. 741, 49 N. E. 2d 1008 (1943), in which the Court of Appeals dismissed a motion for leave to appeal from an order of the Appellate Division, which, like the order here, denied the plaintiff's motion for an order reinstating an appeal to that court which had previously been dismissed for failure to perfect, on the ground that the order did not finally determine the action within the meaning of the New York Constitution.

Other cases in which the Court of Appeals dismissed appeals or denied motions for leave to appeal from somewhat similar orders for lack of finality include: *Hayes* v. *Utica Mut. Ins. Co.,* 20 N Y 2d 938 (1967) (appeal from order denying appellant's motion to further extend time within which to perfect appeal); *Onna* v. *Aim Estates, Inc.,* 20 N Y 2d 955 (1967) (appeal from order dismissing appeal for failure to prosecute); *Benaryeh, Inc.* v. *Hartford Fire Ins. Co.,* 19 N Y 2d 670, 225 N. E. 2d 552 (1967) (appeal from order denying motion to reargue motion to dismiss appeal); *Body* v. *Roosevelt Raceway,* 17 N Y 2d 505 (1966) (appeal from order dismissing appeal for failure to prosecute); *Schildhaus* v. *City of New York,* 16 N Y 2d 833 (1965) (appeal from order

denying motion to vacate prior order conditionally granting motion to dismiss cross appeal for failure to perfect).

As the Court of Appeals indicated in its opinion in the condemnation proceeding, the rights of the parties were finally determined by the 1957 order of the New York Supreme Court denying appellant's motion for commissioners to hear his claim from which appellant did not appeal (20 N Y 2d 568, 571, 232 N. E. 2d 642, Juris. Statement, Exh. H, p. 31).

The present Article 78 proceeding was not finally determined by the order of the Appellate Division denying appellant's motion to reinstate his appeal but by appellant's failure to file and serve his papers within the time prescribed by the previous order of the Appellate Division conditionally dismissing the appeal. Cf. *Van Arsdale* v. *King*, 155 N. Y. 325, 328-329, 39 N. E. 866, 867 (1898); *Matter of Arcadu* v. *Levinson*, 250 N. Y. 355, 357, 165 N. E. 809, 810 (1929).

It is therefore clear that the dilemma appellant finds himself in is the result of his failure to pursue his remedies in the state courts in accordance with the New York rules of practice.

The Court of Appeals also frequently dismisses appeals, or denies motions for leave to appeal, from orders similar to the one involved here on the ground that the orders involve questions of discretion of the type not reviewable by that court. *Manville* v. *Bank of New York*, 22 N Y 2d 934 (1968) (appeal from order dismissing appeal for failure to prosecute, denying motion for enlargement of time within which to perfect appeal and for leave to perfect it upon partial record); *Hayes* v. *Utica Mut. Ins. Co., supra*, 20 N Y 2d 938 (1967) (appeal from order dismissing appeal for failure to perfect); *Benarych*,

Inc. v. *Hartford Fire Ins. Co.*, 19 N Y 2d 670, 225 N. E. 2d 552 (1967), *supra*, (appeal from order dismissing appeal for failure to serve and file papers); *Schildhaus* v. *City of New York*, 16 N Y 2d 833 (1965), *supra*, (appeal from order denying appellant's motion to vacate a prior order which conditionally dismissed a cross appeal for failure to perfect); *Association for Preservation of Freedom of Choice* v. *Nation Co.*, 13 N Y 2d 856, 192 N. E. 2d 273 (1963) (appeal from order and judgment dismissing appeal for failure to prosecute).

The statement of the New York Court of Appeals in the condemnation proceeding (20 N Y 2d 568, 573, 232 N. E. 2d 642, Juris. Statement, Exh. H, p. 32) to the effect that there must be an end to lawsuits and that the time to take an appeal cannot forever be extended applies with even greater force at the present stage of this litigation.

CONCLUSION

The appeal from the order of the Court of Appeals of the State of New York should be dismissed.

June 10, 1969.

Respectfully submitted,

J. Lee Rankin,
Corporation Counsel of the City of New York,
Attorney for Appellees.

Stanley Buchsbaum,
Theodore R. Lee,
of Counsel.

SUPREME COURT OF THE UNITED STATES

October Term, 1969.

FURMAN *v.* CITY OF NEW YORK ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 142. Decided October 13, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.